SUPREME COURT, U. S.

74-572

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

ALBERT JOSEPH ANTICO,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

ALBERT JOSEPH ANTICO,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

This is a Petition of Albert Joseph Antico, for a Writ of Certiorari to review the judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, entered July 26, 1974, and the Order Denying Certification, made August 12, 1974, affirming the Order Granting Probation made by the Municipal Court for the Los Angeles Judicial District, County of Los Angeles, State of California.

OPINIONS BELOW

The Order of the Municipal Court for the Los Angeles Judicial District,[1/] in trial court case number 31439974, was affirmed without opinion by the Appellate Department of the Superior Court, case number CRA 12580, (Appendix "A") and the Order Denying Certification was, also, denied without opinion (Appendix "B").

JURISDICTION

1. Petitioner appealed to the Appellate Department of the Superior Court from the Order of the Trial Court. When the Order was affirmed without opinion, Petitioner requested certification to the Court of Appeal for the State of California to review substantial Federal and State Constitutional questions. Under California Rules of Court, Rule 107, the decision of the Appellate Department is a final judgment.

1/ The case is entitled "People of the State of California vs. Joseph Albert Antico", although Petitioner's true name is Albert Joseph Antico. The record has been amended accordingly.

2. The jurisdiction of this Court is invoked under Title 28, U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Does the right of privacy guaranteed by the Fourth and Fourteenth Amendments of the United States Constitution extend to the viewing and exhibition of sexually explicit films in a motel room.

2. The first search warrant (Warrant No. 7422) fails to specify with particularity the place to be searched in violation of Petitioner's rights under the Fourth and Fourteenth Amendments of the United States Constitution and Article 1 §19 of the California Constitution because it authorizes a search of an entire motel without setting forth any facts to justify a search of each room or any person.

3. The second search warrant was issued without probable cause and it violates Petitioner's right of privacy, as enunciated in Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243 (1969), and the Fourth and Fourteenth Amendments of the United States Constitution.

4. The Condition of Probation imposed by the Court is ambiguous and unintelligible, exceeds the scope of the Court's authority, and is overbroad and unreasonable, in violation of Petitioner's right to due process of law.

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant Constitutional provisions are set forth in Appendix "C". They are:

Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article 1 §19 of the California Constitution.

STATEMENT OF FACTS

Petitioner was charged with eight counts of violating California Penal Code §311.2, each count involving a separate allegedly obscene film.[2/]

2/ There were four cassettes seized and entered into evidence as People's Nos. 3-6. One exhibit, People's No. 4, contained six "loops", five "loops" forming the basis for Counts 2 through 6.

A motion to suppress evidence under Penal Code §1538.5 was denied on July 18, 1973.

On August 10, 1973, Petitioner was found guilty of violating Count 6, Petitioner was acquitted on Counts 3, 4, 5, 7, and 8. The jury was unable to reach a verdict on Counts 1 and 2, a mistrial was declared, and, on September 27, 1973, these counts were dismissed by the Trial Court in the interest of justice.

Petitioner is the owner of a motel which consists of 60 rooms. Twenty-five are set up for closed circuit television which allows the occupants to view films in their room by means of equipment located in the manager's apartment. Two-thirds of the rooms were occupied when the officers arrived and this fact was conveyed to the officers. The occupants of the rooms were not viewing films. The officers searched the entire motel and went into every room.

Officer Dennis M. Feeley, Los Angeles Police Department, testified that this was his first case involving closed circuit television, and that he had no idea

what type of equipment he would be seizing.

When Officer Feeley entered the manager's apartment, Petitioner was in the apartment and the film "Count All Come" (People's Exhibit 6, Count 8) was playing on the television. He did not see the film playing on any other television set.

Prior to obtaining the second search warrant, Officer Feeley viewed the films in People's Exhibits 4, 5, and 6, on the manager's television. He did not know the contents of the film cassettes prior to removing the film tape and playing it on the equipment in the manager's apartment. In order to view the films, it was necessary to get instructions on operation of the equipment from Petitioner.

Petitioner raised the right of privacy issue and the questions regarding the validity of the search warrants at the hearing on the motion to suppress evidence. The right of privacy issue was raised again at the conclusion of the People's case and after the defense rested, prior to the case being submitted to the jury. Petitioner objected to the

particular term of probation, which is the subject of this Petition, at the time probation was granted.

CONTENTIONS

I

DOES THE RIGHT TO PRIVACY GUARANTEED BY THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION EXTEND TO THE VIEWING AND EXHIBITION OF SEXUALLY EXPLICIT FILMS IN A MOTEL ROOM

Petitioner stands convicted of exhibiting or distributing a film found to be obscene to persons viewing the film in the privacy of their motel room. The distribution of the film having been accomplished by closed-circuit television between the motel manager's apartment and the individual motel room. The system was hooked up to a room only when the room was rented by someone who requested the films.

Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243 (1969) is not decided on any First Amendment right, but on the right to privacy in the home. (United States

v. 12 200 ft. Reels of Super 8MM Film, 413 U.S. 123, 93 S.Ct. 2665, 2668 [1973].) The States retain broad power to regulate obscenity, but that power does not extend to the privacy of an individual's home (Stanley v. Georgia, supra, 394 U.S. 557, 89 S.Ct. 1243).

Petitioner is cognizant of the rule that the right of privacy does not give rise to a correlative right to have someone sell or give it to others. (United States v. Thirty-Seven Photographs, 402 U.S. 363, 376, 91 S.Ct. 1400, 1408 [1971].) However, in reading the cases which have discussed this rule it must be kept in mind that they involved sales or distribution in the open marketplace or interstate commerce. There is a big difference between the indescriminate distribution of obscenity to the public and the exhibition of films to persons requesting the films be shown to them via closed-circuit television in the privacy of a motel room. The Court has consistently differentiated between protection of obscenity outside the home and the right of privacy which extends special Constitutional safeguards to the home. (United

States v. Orito, 413 U.S. 139, 93 S.Ct. 2674, 2677 [1973].)

This is not a public theatre where the only attraction is the film being shown for a fee (Paris Adult Theatre v. Slaton, 413 U.S. 429, 93 S.Ct. 2628 [1973]), but rather a motel where the films are not the chief item of sale. Of sixty rooms, only twenty-five were equipped for closed-circuit television, and the mere rental of a room did not automatically mean the films would be shown. If the films were requested, the television would be plugged in to the equipment in the manager's apartment and the tenant could then view the films in the privacy of his room. If not requested, the system was not plugged in to that particular room.

The courts have recognized that man requires some sanctuary in which his freedom to escape the intrusions of society is all but absolute. A motel room is entitled to the same protection and considerations as afforded to a home (United States v. Jeffers, 342 U.S. 48, 72 S.Ct. 93 [1951]), and this carries with it the expectation of privacy. (People

v. Dumas [1973] 9 Cal.3d 871, 882.)

Had the Petitioner invited some friends into his home or the manager's apartment to view films on his closed-circuit television system, there is little doubt that Stanley, Miller, and Paris Adult Theatre would prohibit prosecution. The right of Petitioner and his friends to share their thoughts in private would be protected. Yet, in this case, the People prosecute a motel owner for making his collection of films available for perusal by his motel clients in the privacy of their rooms. The Constitutional right to privacy should apply with equal force in both situations.

II

THE FIRST SEARCH WARRANT (WARRANT NO. 7422) FAILS TO SPECIFY WITH PARTICULARITY THE PLACE TO BE SEARCHED IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE 1 §19 OF THE CALIFORNIA CONSTITUTION BECAUSE IT AUTHORIZES A SEARCH OF AN ENTIRE MOTEL WITHOUT SETTING FORTH ANY FACTS TO JUSTIFY A SEARCH OF EACH ROOM OR ANY PERSON

The first search warrant issued in this case (Search Warrant No. 7422, Appendix "D"), was issued by the Municipal Court of the Los Angeles Judicial District.

The warrant provides that "you are therefore, commanded to make immediate search in the daytime of the premises located and described as, "The Hollywoodland Motel" located at 10730 Ventura Boulevard, North Hollywood, California. The premises is described as a two story stucco building located on the south side of Ventura Boulevard .... The building is gold in color with pink and green doors on the rooms. The ... sign is above the entrance to the motel."

This is the same description as the one given by Officer Feeley in his Affidavit in Support of and Petition for Search Warrant.

"The Fourth Amendment provides that '. . . no warrants shall issue, but upon probable cause, supported by Oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' These words are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new nation should forever 'be secure in their persons, houses, papers, and effects' from intrusion and seizure by officers acting under the unbridled authority of a general warrant." (Stanford v. Texas, 379 U.S. 476, 481, 85 S.Ct. 506, 510-511 [1965]. See also, Lochridge v. Superior Court [1969] 271 Cal.App.2d 612, Calif. Const., Art. 1 §19; California Penal Code §1525.) It is essential that the underlying affidavit, and the warrant itself, describe with particularity the place to be searched. (Berger v. State of New York, 388 U.S. 41, 55, 87 S.Ct. 1873,

1882 [1967]; Trupiano v. United States, 334 U.S. 699, 710, 68 S.Ct. 1229, 1235 [1948]; People v. Fitzwater [1968] 260 Cal.App.2d 478, 485.)

"The proceeding by search warrant is a drastic one (citation omitted), and must be carefully circumscribed so as to prevent unauthorized invasions of the sanctity of a man's home and the privacies of life (citation omitted)." Berger v. State of New York, supra, 388 U.S. 41, 58, 87 S.Ct. 1873, 1883.

The affidavit requests a search of the entire motel. Nowhere in the affidavit is there any allegation to form the basis for probable cause to search each room in the motel. The search warrant follows the language of the affidavit and authorizes a search of the entire motel. The warrant does not set forth any facts from which the magistrate could determine that any of the property to be seized was located at the motel.

The requirement that a particular place be described in the warrant when applicable to dwellings means a single living unit, and a warrant describing an

entire building with "multiple living units is void unless issued on probable cause for searching each apartment or living unit. . . ." (People v. Govea [1965] 235 Cal. App.2d 285, 300; People v. Estrada [1965] 234 Cal.App.2d 136, 146.) No person or tenant was mentioned in the warrant, and whenever a warrant is directed to search a premises occupied by several tenants it is usually void if it fails to specify the subtenant to be searched. (People v. Fitzwater, supra, 260 Cal.App.2d 478, 487.)

"The description in a search warrant must be sufficiently definite that the officer conducting the search 'can with reasonable effort identify the place intended' [citing cases]. Nothing should be left to the discretion of the officer" [citing cases]. People v. Dumas (1973) 9 Cal.3d 871, 880. Several cases have upheld ambiguous warrants where the ambiguity may be resolved by reference to the affidavit. Reference to the affidavit may be permissible when there is no danger to intrusion upon the rights of persons, other than the person named in the warrant, that occupy the multiple dwelling

unit. (People v. Grossman [1971] 19 Cal. App.3d 8, 12-13.) No person was named in this warrant!

There is nothing in the affidavit or warrant which limits the search to a particular person or room. In fact, while Officer Feeley entered the manager's apartment, the other officers dispersed around the grounds and conducted a room by room search of the motel. The search of the motel rooms was conducted even though the persons in the rooms were not viewing films and all of the equipment was in the manager's apartment. These facts point up the danger of issuing an overly broad warrant.

"Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on a proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance." (Johnson v. United States, 333 U.S. 10, 14, 68 S.Ct. 367, 369 [1948].)

A guest in a hotel room is entitled to Constitutional protection against unreasonable searches and seizures, the same as a tenant of a house or the occupant of a room in a boarding house. (Stoner v. California, 376 U.S. 483, 490, 84 S.Ct. 889, 893 [1964].) The same rule applies in California, that a motel room is a man's castle and entitled to the same Fourth Amendment protection as a private dwelling. The rules which apply to a private home are applicable to a motel room. (People v. Arellano [1966] 239 Cal.App.2d 389, 391; Jacobs v. Superior Court [1973] 36 Cal.App.3d 489, 494-495; People v. Burke [1962] 208 Cal.App.2d 149.)

This was the officer's first case involving closed circuit television and it appears that he did not make any investigation to narrow down the location of the equipment. "Ignorance should not substitute for the necessity of particularly describing the place to be searched. . . ." (People v. Sheehan [1972] 28 Cal.App.3d 21, 26.)

It was this warrant that served as the basis for the officer's entering the

manager's apartment where they viewed the film in People's Exhibit 6 and the cassettes containing the other film (People's Exhibits 4 and 5). If the search warrant is invalid, then the officers were not justified in entering the manager's apartment. Had they not entered the apartment, the officers would not have seen the other films which were seized under the second warrant. Evidence which is seized as the result of an illegal entry is inadmissible (People v. Bennetto [1974] 10 Cal.3d 695, 699), therefore the films should have been suppressed because of the defect in the first warrant.

III

THE SECOND SEARCH WARRANT WAS ISSUED WITHOUT PROBABLE CAUSE AND IT VIOLATES PETITIONER'S RIGHT OF PRIVACY, AS ENUNCIATED IN STANLEY v. GEORGIA, 394 U.S. 557, 89 S.Ct. 1243 (1969), AND THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

When the officers entered the motel on March 9, 1973, to serve Search Warrant number 7422, Mr. Antico was in the manager's apartment and the film "Count All Come" was playing on the television set. The officers had no previous information regarding this film and they did not see the film playing on any other television set.

Examination of the cassettes from the outside and the videotapes themselves did not reveal the contents of the films. Officer Feeley had to enlist Petitioner's assistance in order to view People's 4 and 5, and then, according to Officer Feeley's Affidavit in Support of Search Warrant, he spent over two hours viewing

these films.[3/]

Based on this second affidavit, a second search warrant was issued (Search Warrant No. 7424; Appendix "E"). Pursuant to this warrant the film was seized that was the basis for Petitioner's conviction.

This Court has held that a "seizure of one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material" (Roaden v. Kentucky, 93 S.Ct. 2796, 2800 [1973]), and that allegedly obscene material is given additional protection by requiring a scrupulous adherence to the provisions of the Fourth Amendment (Marcus v. Search Warrants, 367 U.S. 717, 81 S.Ct. 1708 [1961]; Stanford v. Texas, supra, 379 U.S. 476, 85 S.Ct. 506). A stronger

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3/ Officer Feeley only observed the first ten minutes of People's #4 (Count 2). He did not view the portion of People's #4 that became Count 6. He viewed the films contained in People's #5 (Count 7) and People's #6 (Count 8) in their entirety. Since the only real issue during trial was whether the films are obscene, the verdicts of acquittal on Counts 7 and 8 are tantamount to a jury determination that the seized films were not obscene. (People v. Superior Court [1972] 28 Cal. App.3d 600, 614.)

showing of probable cause is required for the issuance of a search warrant to seize allegedly obscene material (People v. Golden [1971] 20 Cal.App.3d 211, 216).

This Court has further held that a State does not have the right to tell a man what he may read or what films he may watch in private, and the State cannot make the mere possession of obscene films illegal. (Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243 [1969].) In Stanley, the Court held that the officers' actions violated the Fourth and Fourteenth Amendments, when, pursuant to a search warrant to seize other material, they observed reels of films and then used the defendant's projector to view the films. After viewing the films the defendant was placed under arrest and the films seized.

The same situation exists in the present case, as it did in Stanley. While the question may be closer because the officers were there to seize a film, the evidence with respect to the second seizure is the same. The officers entered Mr. Antico's apartment at the motel and observed that he was in the room while a

movie was playing on the television. There was no one else in the room and no evidence that the film was being seen by anyone other than Petitioner. In other words, as to this film "Count All Come", the only inference that can be drawn from the facts is that Mr. Antico was playing the film for his own benefit.

The seizure of People's #4, 5 and 6 is exactly like Stanley. The officers had no idea what was on the films and they had to use defendant's equipment in order to view the films. Again, there was nothing to tie these films in with the film observed on March 6, 1973, which was the basis for issuance of the first warrant.

The mere fact that a party possesses an item that may be illegal to possess under certain circumstances, does not justify a conclusion that all other items of a similar nature are to be used in the same manner. (People v. Martin [1973] 9 Cal.3d 687, 696.) Nowhere in the affidavit are there any articulable facts to support a conclusion that these films were possessed, at this time, for an illegal purpose. A search based on events that

are as consistent with innocent or protected conduct as with criminal activity is unlawful. (Remers v. Superior Court [1970] 2 Cal.3d 659, 664.)

No probable cause existed for the issuance of a search warrant and the subsequent seizure of the film which was the basis for Petitioner's conviction and the film should have been suppressed as evidence.

IV

THE CONDITION OF PROBATION IMPOSED BY THE COURT IS AMBIGUOUS AND UNINTELLGIBLE, EXCEEDS THE SCOPE OF THE COURT'S AUTHORITY, AND IS OVERBROAD AND UNREASONABLE, IN VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS OF LAW

The Order Granting Probation includes the following term of probation:

> "Defendant shall not engage or assist in the sale, distribution or exhibition of any magazines, folios, brochures, pamphlets, books, photographs, films, or any other matter which depicts acts of sexual intercourse, oral or

anal copulation, fornication, masturbation, buggery, sodomy, bestiality, or which involves any manipulation or exposure of genitals by or with human beings or animals. Further, defendant shall not be the owner, manager, clerk, or salesman, usher, ticket seller or employer of any store, stand, shop, theater, or any other place where such books, magazines, papers, folios, brochures, photographs, films, or matter are offered for sale, rental exhibition, viewing or distribution. Additionally, defendant shall not operate any projector, slide viewer, or image-producing device which shows any of the activities mentioned above."

The condition imposed is unlimited in its scope and effect. It covers films, books, and pamphlets that may be classified as not obscene, as well as those that exceed the permissible limits enunciated in the various statutes and cases.

Petitioner was convicted of exhibiting a film, yet the condition covers all types of written or printed material, including material that could be obscene, or not, depending on the circumstances under which it is presented. It, also, prevents Petitioner from acquiring any of this material for his own use and from exhibiting it for his own pleasure, which violates the rights of an individual to possess and exhibit films or written material for his own pleasure, as discussed in Stanley v. Georgia, supra, 394 U.S. 557, 89 S.Ct. 1243.

In looking at the words, the ambiguities become apparent and the following questions and objections are raised:

a) What does it mean to "engage or assist in the sale, distribution or exhibition" of items? Does that include purchasing the items for his own use? Is it limited to commercial ventures or does it include giving something away?;

b) Even Miller does not rule out all material which shows sex acts; does this condition rule out all depictions of the acts stated or only those which violate

the Miller standards?;

c) The exposure of genitals or showing masturbation is not in and of itself illegal,[4/] therefore isn't it rather overbroad to rule out all matter in which the genitals are shown?;

d) It also appears that Petitioner is prohibited from making a film, or writing a book, or distributing literature about animals unless he puts clothes on them. He couldn't even work for an organization that worked to protect and benefit animals for fear he would distribute or sell something that showed an animals's genitals. It says "human beings or animals". There is nothing to limit it to sex acts between humans and animals, which might be obscene;

e) The last sentence appears to fly squarely in the face of Stanley and

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4/ In Miller v. California, 413 U.S. 515, 93 S.Ct. 2607, 2615 (1973), the Court emphasized that the State court regulate "patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." Not everything is patently offensive. (Jenkins v. Georgia, 94 S.Ct. 1750 [1974].)

infringes on Petitioner's constitutional right to privacy. Does it prohibit all commercial operation of a projector or slide viewer and all personal use, or is it limited to some undefined circumstances? Again, it would appear to rule out showing films of his dog, cat, or horse, unless he puts clothes on the animals.

"The trial Court has very wide discretion in setting the conditions of probation, but its discretion is not boundless." (People v. Dominguez [1967] 256 Cal.App.2d 623, 626.) A condition of probation is invalid if it "(1) has no relationship to the crime of which the defendant is convicted, (2) relates to conduct that is not itself criminal, or (3) requires or forbids conduct that is not reasonably related to future criminality." (In re Bushman [1970] 1 Cal.3d 767, 776-777; In Re Mannino [1971] 14 Cal. App.3d 953, 960.)

"Where a condition of probation requires a waiver of precious Constitutional rights, the condition must be narrowly drawn; to the extent it is overbroad it is not reasonably related to the

compelling state interest in reformation and rehabilitation and is an unconstitutional restriction on the exercise of fundamental Constitutional rights [Citations]." (People v. Mason [1971] 5 Cal. 3d 759, 768 [Peters, J. dissenting].) Even if the terms of probation are related to the type of activity for which defendant was convicted, they must not be so overbroad as to interfere with lawful activity. (People v. Arvanites [1971] 17 Cal.App.3d 1052, 1063.)

As pointed out, above, the condition of probation is much too overbroad and, at the least, very ambiguous. The terms seriously infringe on protected Constitutional rights and prohibit lawful activity which is in no way related to the criminal conduct for which Petitioner was convicted. The term should be ordered stricken from the Order Granting Probation.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted and that the issues herein presented be given plenary consideration by this Honorable Court.

Respectfully submitted,

PAUL J. CRUM

Attorney for Petitioner

APPENDIX A

RECEIVED JUL 2 9 1974

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

Superior Court No. CR A 12580

Trial Court No. 31439974

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

JOSEPH ALBERT ANTICO,
Defendant and Appellant.

ON APPEAL
from the
MUNICIPAL COURT
of the
Los Angeles
Judicial District,
County of Los Angeles,
State of California.
Michael T. Sauer, Judge
(311.2 PC)

FILED
JUL 23 1974
CLARENCE E. [illegible] County Clerk
[signature] DEPUTY

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is ORDERED and ADJUDGED that the order granting probation and order denying motion to suppress evidence pursuant to Penal Code § 1538.5 made and entered in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby affirmed.

POOR COPY

BY THE COURT JUL 26 1974

Katz, Presiding Judge
Holmes Judge
Cole Judge

Appendix "A"

APPENDIX B

RECEIVED AUG 1 3 1974

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sd

FILED
AUG 1 2 1974
CLARENCE L. [illegible], County Clerk
D R Sterling
BY D. R. STERLING, DEPUTY

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. JOSEPH ALBERT ANTICO, Defendant and Appellant.	Superior Court No. CR A 12580 Municipal Court of the Los Angeles Judicial District No. 31439974 ORDER DENYING CERTIFICATION

The petition of appellant for certification after judgment of this court on appeal in the above-entitled case having been filed and having been duly considered,

Said petition is hereby denied.

Kitz
Presiding Judge

J. Holmes
Judge

Merrick
Judge

APPENDIX "B"

APPENDIX C

APPENDIX C

APPENDIX "C"

AMENDMENT IV-SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall

private property be taken for public use, without just compensation.

AMENDMENT XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Art. 1 §19. Searches and seizures; warrant

Sec. 19. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue, but on

probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

APPENDIX D

APPENDIX D

IN THE MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

SEARCH WARRANT

The people of the State of California to any Sheriff, Constable, Marshal, Policeman, or any other peace officer in the County of Los Angeles:

Proof by affidavit, having been this day made before me by D. M. Feeley, Serial number 14292, police officer for the City of Los Angeles, that there is probable and reasonable cause for the issuance of a search warrant, as set forth in the affidavit attached hereto and made part hereof as if fully set forth herein; you are therefore, commanded to make immediate search in the daytime of the premises located and described as,"The Hollywoodland Motel" located at 10730 Ventura Boulevard, North Hollywood, California. The premises is described as a two story stucco building located on the south side of Ventura Boulevard between Fruitland Drive on the west side and Willowcrest Avenue on the east side. The building is gold in color with pink and green doors on the rooms. The words Hollywoodland Motel in black lettering on a yellow background sign is above the entrance to the motel. A neon sign appears on a pole in front of the building with the words "heated pool - Hollywoodland - steam baths - water beds. There is a sign on the east side of the building stating

APPENDIX "B"

Hollywoodland Motel, pools, kitchens, TV-Phones-Air conditioned. There are two signs located on the west side of the location stating Hollywoodland Motel. This is the only business at this location.

You are commanded to search for the following personal property: to wit: reels of video tapes containing all or any part of the films described in the affidavit attached hereto and made a part hereof. The video tape player, attached monitor television set, and other equipment necessary to transmit the video picture to the monitor television set, and also the television set located in room 4, at 10730 Ventura Boulevard, where your affiant viewed the video films described in the affidavit attached hereto and made a part hereof.

And, if you find the same or any part thereof, to bring it forthwith before me at the Municipal Court of the Los Angeles Judicial District, State of California, or to any other court in which the offense in respect to which the property or things is triable, or retain such property in your custody, subject to the order of this court, pursuant to Section 1536 of the Penal Code of the State of California.

Given under my hand this _____day of March, 1973.

_____
Judge of the Municipal Court

SW
7122

IN THE MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

STATE OF CALIFORNIA } ss
COUNTY OF LOS ANGELES }

AFFIDAVIT IN SUPPORT OF AND PETITION FOR SEARCH WARRANT

Personally appeared before me this _____ day of March, 1973, your affiant, D. H. FEELEY, #14292, Police Officer of the Los Angeles Police Department, makes complaint, and deposes and says that he has reasonable cause to believe, and that he does believe, that there is now a motion picture film on the premises located at and also described as: "The Hollywoodland Motel" located at 10730 Ventura Boulevard, North Hollywood, California. The premises is described as a two story stucco building located on the south side of Ventura Boulevard between Fruitland Drive on the west side and Willowcrest Avenue on the east side. The building is gold in color with pink and green doors on the rooms. The words Hollywoodland Motel in black lettering on a yellow background sign is above the entrance to the motel. A neon sign appears on a pole in front of the building with the words "heated pool - Hollywoodland - steam baths, water beds. There is a sign on the east side of the building stating Hollywoodland Motel, pools, kitchens, TV, phones, air conditioned. There are two signs located on the west side of the location stating Hollywoodland Motel. This is the only business at this location. The motel is exhibiting motion pictures depicting sexual intercourse, oral copulation,

APPENDIX "D"

and masturbation.

Your affiant says that there is probable and reasonable cause to believe, that he does believe, that said property constitutes property or things in possession of a person with the intent to use it as a means of committing a public offense, to wit: violation of Section 311.2 of the Penal Code of the State of California.

Your affiant says that the facts in support of the issuance of the search warrant are as follows:

Your affiant has been a police officer for five years, and for the past 9 months your affiant has been assigned to the North Hollywood Division Vice Unit as a vice investigator.

In his experience, your affiant has assisted in several arrests for vice violations. Your affiant has received formal and informal academy training in the field of pornography. Your affiant has received information on the manner and the means in which commercial pornography is conducted in the County of Los Angeles from those persons involved in the business, and other officers, who are experienced in the field of pornography. It is the opinion of your affiant that the video tapes which he viewed and described as previously mentioned, when taken as a whole, is substantially beyond the contemporary limits of candor for this area and is designed to appeal to the prurient interest of the viewer and has no social redeeming value.

On February 26, 1973, your affiant received information from Officer Ganley, #11290, Administrative Vice, that the Hollywoodland Motel located at 10730 Ventura Boulevard was showing hard core movies through a video tape system which is located in the motel. These films are in violation of 311.2 of the Penal Code.

On March 2, 1973, your affiant observed an advertisement in the Los Angeles Free Press newspaper (See attachment #1). The advertisement stated, "Porno & Privacy now for your enjoyment hardcore films to your room via closed circuit T.V. Full color sound, complete privacy, water beds and mirrors too! The Hollywoodland Motel, 10730 Ventura Blvd. North Hollywood, North Hollywood, California."

On March 3, 1973, your affiant called telephone number 769-2000 and spoke with a male voice who stated he was the manager. Your affiant inquired as to the nature of the movies and the manager stated, "the ad states that the films are hardcore and that is just what they are."

On March 6, 1973, at approximately 1200 hours, Officer Feeley, #14292, and Policewoman Judy Williams, #R580, went to 10730 Ventura Blvd., the Hollywoodland Motel, to conduct an investigation at this location. Officer Feeley and Williams entered the office of the motel and were met by a clerk who is described as a male, Caucasian, approximately 30 to 35 years of age, dark hair, approximately 5'11" tall and approximately 160 lbs. The manager was wearing a gray shirt and gray pants. After speaking to the manager for approximately 3 minutes your affiant recognized his voice as the same voice on the telephone earlier regarding sex movies at that location. Officer Feeley told the manager that he had heard this place had some good films. The manager stated, "Yes, you're right. This is the place." Officer Feeley asked the manager, "Do the films have sucking and fucking." The manager stated, "I have some films and they are real hard core." Officer Feeley asked the manager how this comes about. The manager stated, "the films are on close circuit TV. All you have to do is turn on the television." Officer Feeley asked the manager, "Do I have to put money into the television?" The manager stated, "No, all you do is pay for the room and turn on channel 6 and I plug you into the movie. It will cost you $17.00 for the both of you. I'll even give you a queen size

bed. Officer Feeley gave the manager $17.00 and signed the guest register under the name of Ken Howard. The manager gave Officer Feeley a key to room #2 and stated the room was located around the corner alongside the pool area. Officer Feeley and Officer Williams proceeded to room #2 and opened the door. The room was in the process of being cleaned as the bed was unmade. Officer Feeley returned to the manager's office and told the manager that room #2 was not available to rent. The manager then gave Officer Feeley a key to room #4. The manager then picked up a telephone on a PBX switchboard and stated to an unknown person, "Disconnect room #2 and plug them into room #4. Officer Feeley and Williams went to room #4 and entered the motel room. Officer turned on the television set to channel 6 and a picture appeared on the screen.

The film opened with a male Caucasian approximately 27 years of age. He had a mustache, long side burns, and was wearing a blue shirt with red and white striped pants. There was a female Caucasian sitting on a couch next to the male. The female was approximately 23 years of age and had long brown hair. Both persons are seated on the couch and they are embracing each other and kissing each other. The female then undresses the male except for his shirt and begins to orally copulate the male's erected penis. The male then undresses the female so she is completely nude and she again orally copulates the male. The female then positions herself on top of the male who is still seated on the couch. The male inserts his erected penis into the female's vaginal opening and again having sexual intercourse. The next scene shows an unknown male Caucasian looking at the couple engaging in sexual intercourse through a curtain. The camera goes back to the male and female engaging in sexual intercourse. The camera focuses again and again on the pubic and genital areas of the couples engaging in sexual intercourse. The male Caucasian then removes his erected penis from the female and reaches a climax by ejaculating semen on the buttock area

of the female.

The next scene of the movie shows a male Caucasian approximately 30 years of age with dark hair and long side burns walking the streets of an unknown city.

The next scene of the film shows two female Caucasians who are completely nude and are lying on a bed. The females are facing each other and have a plastic dildo which is approximately 18" long and the ends of the dildo are inserted into each of the female's vaginal area.

The film then shows the male Caucasian who is walking the streets opening the door of the room in which the two females are engaging in masturbation on the bed.

The film then shows one of the females,who is approximately 23 years of age with black hair, on top of the other female and she has strapped onto her body a plastic dildo which is in the shape of an erected human penis and she is engaging in masturbation of the other female by inserting the dildo into the female's vaginal area and simulating sexual intercourse by moving the dildo in and out. The camera shows a close up of the females embarcing and kissing each other and carressing the breasts of each other and shows close ups of the dildo in the female's vagina.

The scene goes to the male who is looking through the door leaving the location and running down the street of an unknown location. The scene of the man running down the street is in slow motion. The film then flashes back and forth to the two girls in the room who are engaging in mascurbation and the male running through the streets again in slow motion. The film shows the male sitting in a restaurant

and talking about the things he has observed while looking through the windows.

The next scene shows a female in her early 20's, with dark hair, and a male who is also in his 20's, lying completely nude on a bed. The female is kneeling over the face of the male and he is orally conulating the female's vagina. The male is inserting his tongue into the vaginal opening of the female.

The next scene that comes onto the TV screen are various male and female Caucasians who are completely nude, engaging in sexual intercourse, oral copulation, musturbation. The film shows males and females engaging in sexual intercourse in various positons. The camera shows close ups of the pubic and genital area of the females and males. These scenes flash from one scene to another and then back to the other scene.

The next scene shows two females and one male engaging in sexual intercourse and oral copulation. The scene then flashes back to various persons engaging in sexual intercourse and oral copulation.

The next scene shows a male Caucasian wearing a brown shirt and dark pants and a female Caucasian wearing a dark sweater and levi type pants. The couple then begin to undress each other until they are completely nude. The camera then shows the male Caucasian looking through the window appearing to watch the couples inside the room. The female then begins to orally copulate the male. The male then engages in sexual intercourse with the female with the male on top of the female.

The next scene shows the male again running through the streets of the city with flashback scenes of the male and female engaging in

sexual intercourse.

The next scene of the film shows a male who is fully dressed and a female who is wearing a filmy two piece night gown in a room.

Officer Williams then went to the manager's office and asked for change for the cigarette machine. The manager asked Officer Williams how she liked the films that were in the room. Officer Williams replied, "The films were fantastic." Officer Williams then returned to the motel room. The film shows the couple undressing each other. They remove all their clothes so they are completely nude. The female is sitting on the edge of the bed with the male standing along side the bed with the female orally copulating the male's erected penis. The couple then lie down on the bed and the male begins carressing the female's pubic area and breast. The male then inserts his finger into the female's vagina. The next scene shows the male orally copulating the female's vagina. The camera shows the male Caucasian looking through the window at the couple who are on the bed. The male Caucasian then kneels on top of the female's face and she begins to orally copulate the male. The male then engages in sexual intercourse by inserting his erected penis in the female's vagina. The female is on her back with her legs pulled up to her stomach area. The male then removes his penis from the female's vagina and reaches a climax by ejaculating semen on the female's buttock area.

The next scene that appears on the television screen are flash scenes with various couples engaging in sexual intercourse and oral copulation and the peeping tom looking through the window.

The film ends with the male running through the streets of the city. The film is approximately one hour in length.

The dominant theme of the film taken as a whole, obviously is designed to appeal to the prurient interest in sex of the viewers and is patently offensive in that the focus of the camera returns again and again to the penis and scrotum of the males and the vaginal area of the females.

The previously described films vividly reveals acts of nudity and sex and in your affiant's opinion, fails to impart any beneficial ideas of scientific or social important and is in your affiant's opinion in violation of the obscenity definition of the State of California. The exhibitors are in violation of Section 311.2 P.C.

The location to be searched: The Hollywoodland Motel, located at 10730 Ventura Boulevard, North Hollywood, California. The premises is a two story stucco building located on the south side of Ventura Boulevard between Fruitland Drive on the west side and Willowcrest Ave. on the east side. The building is gold in color with pink and green doors on the rooms. The words Hollywoodland Motel in black lettering on a yellow background sign is above the entrance to the motel. A neon sign appears on a pole in front of the building with the words, "heated pool - Hollywoodland - steam baths, water beds." There is a sign on the east side of the building stating Hollywoodland Motel, pools, kitchens, TV, phones, air conditioned. There are two signs located on the west side of the location stating Hollywoodland Motel. This is the only business at this location.

Items to be seized: Reels of video tapes containing all or any part of the films described in the affidavit attached hereto and made a part hereof. The video tape player, attached monitor television set, and other equipment necessary to transmit the video picture to the monitor television set, and also the television set located in room 4 at 10730 Ventura Blvd., where your affiant viewed the video films

described in the affidavit attached hereto and made a part hereof.

Your affiant was acting in an undercover capacity and did not identify himself on the premise.

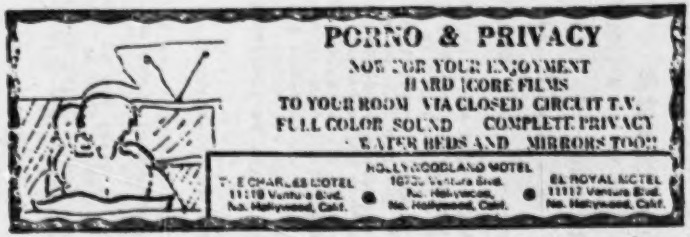
Your affiant has reasonable cause to believe that grounds for the issuance of a search warrant exist, as set forth in Section 1524 of the Penal Code, based on the aforementioned information, facts and circumstances.

Your affiant prays that a search warrant be issued, based on the above facts for the seizure of said property or any part thereof in the daytime, and the same be brought before this magistrate or retained subject to the order of this court in which the offense in respect to which the property or things taken is triable, pursuant to Section 1536 of the Penal Code of the State of California.

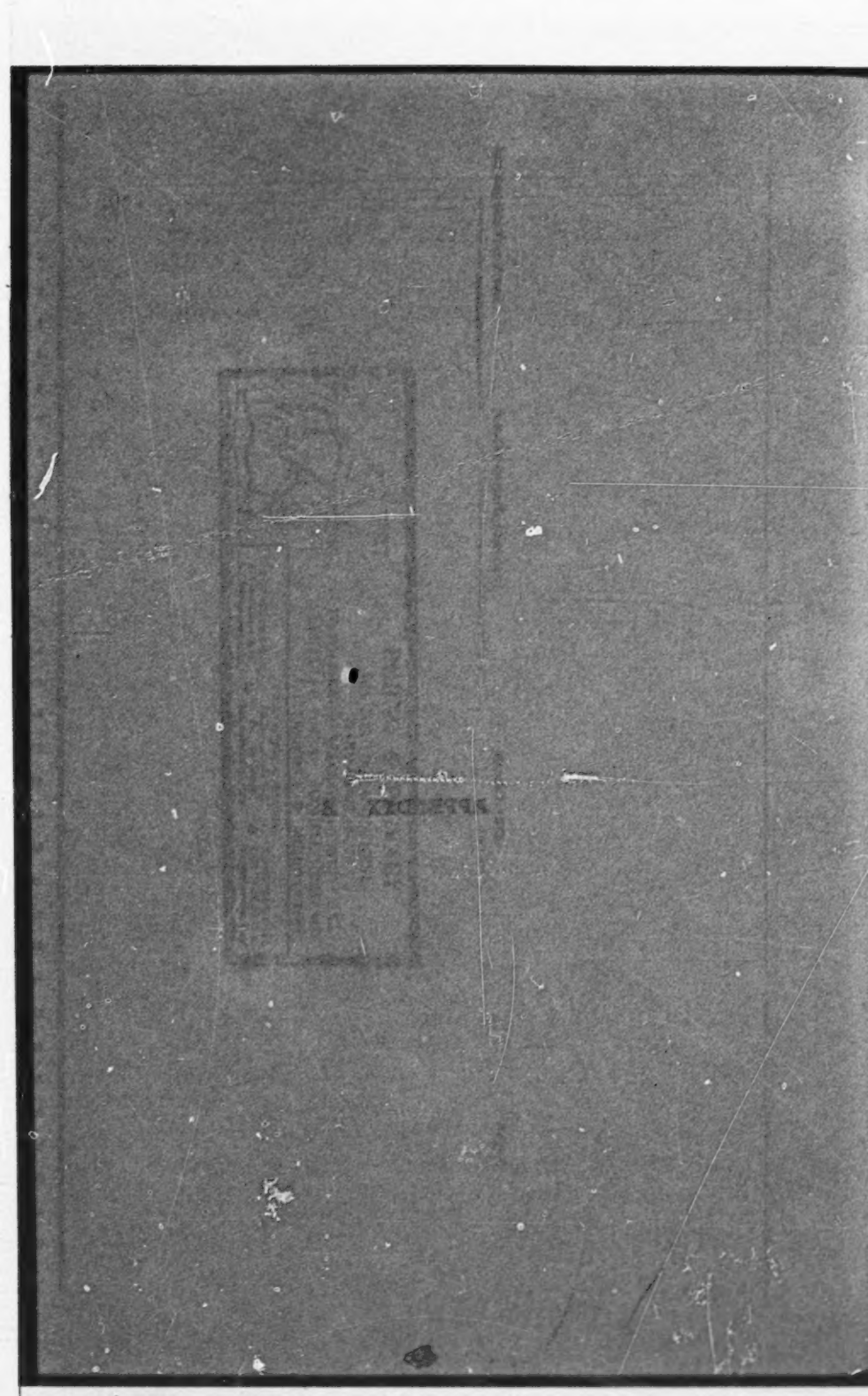
DENNIS H. FEELEY, #14292

Subscribed and sworn to before me
on this ____ day of March, 1973,
at _____ .m.

Judge of the Municipal Court


PORNO & PRIVACY
NOW FOR YOUR ENJOYMENT
HARD CORE FILMS
TO YOUR ROOM VIA CLOSED CIRCUIT T.V.
FULL COLOR SOUND COMPLETE PRIVACY
WATER BEDS AND MIRRORS TOO!!
HOLLYWOODLAND MOTEL
11919 Ventura Blvd.
No. Hollywood, Calif.
EL ROYAL MOTEL
11917 Ventura Blvd.
No. Hollywood, Calif.

APPENDIX I



Search Warrant No. 7424

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

SEARCH WARRANT

PEOPLE OF THE STATE OF CALIFORNIA to any sheriff, policeman or peace officer in the County of Los Angeles:

PROOF by affidavit having been made before me by (name) that there is probable cause to believe that the property described herein may be found at the locations set forth herein and that it falls within these grounds indicated below by "x" (s) in that it:

____ was stolen or embezzled

____ was used as the means of committing a felony

__X__ is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom he may have delivered it for the purpose of concealing it or preventing its discovery

____ is evidence which tends to show that a felony has been committed or a particular person has committed a felony;

you are therefore COMMANDED to SEARCH HOLLYWOOD LAND HOTEL 1670 VENTURA BLVD, NORTH HOLLYWOOD CALIFORNIA A TWO STORY STUCCO BUILDING, FACING NORTH BETWEEN STREETS FRANKLAND DE LAO WILLOUGHBY AVE

M-1

A PERSON "S"

for the following property: 3 REELS OF VIDEO TAPE FILM ON PLASTIC REELS. SERIAL NUMBER ON EACH REEL IS NUMBER 113710. WRITEN ON THE REELS IS, " HYPNO TIRED DUB, LOOPS # 1-5; COUNT ALL COME.

and to SEIZE it if found and bring it forthwith before me, or this court, at the courthouse of this court.

Good cause having been shown by affidavit, you may do such of the following as bear my initials.

_____ You may serve this Warrant at any time of the day or night, according to Penal Code Section 1533.

_____ You need not comply with Penal Code Section 1531.

GIVEN under my hand and dated this day of 197 .

_____
Magistrate

Judge of the _____ Court _____
Superior/Municipal Judicial District

Attachment No. 1

OBSERVATIONS OF AFFIANT

D. M. FEELEY # 14242

Your affiant, a peace officer, employed by Los Angeles Police Dept. states that he has been a peace officer for 5 years, and that his present assignment is North Hollywood Vice

That on March 9, 1973 (date) at 1300 (time) p.m., your affiant observed the following:

ON MARCH 9, 1973 AT APPROXIMATELY 1300 HOURS. YOUR AFFIANT WENT TO 10730 VESTAL BLVD. THE HOLLYWOODLAND MOTEL, TO SERVE SEARCH WARRANT NUMBER 7422 SIGNED BY JUDGE WILBER G. DITMAR, JUDGE OF THE MUNICIPAL COURT.

YOUR AFFIANT WHILE CONDUCTING THE SEARCH FOR THE VIDEO TAPES LISTED IN THE SEARCH WARRANT WHICH HE WAS COMMANDED TO SEIZED, OBSERVED 3 REELS OF VIDEO TAPE.

THESE REELS OF VIDEO TAPE WERE LOCATED IN THE MANAGERS APARTMENT WHICH IS LOCATED TO THE WEST OF THE MAIN OFFICE OF THE MOTEL.

BELOW IS A SPECIFIC DESCRIPTION OF THE SEXUAL ACTIVITIES GRAPHICALLY DIPICTED IN EACH OF THE REELS, EACH OF THE REELS SHOW ON NUMEROUS

OCCASIONS IN SUCH A MANNER VARIOUS SEXUAL ACTIVITIES. THE CAMERA SHOWS CLOSE UPS OF THE PUBIC AND GENITAL AREAS WHILE THEY ARE PERFORMING THE DESCRIBED SEXUAL ACTIVITYS. REEL # 113710 " LOOPS #1-5. VIEWED 10 MINUTES DIPICTS A MALE AND FEMALE ENGAGING IN ORAL COPULATION AND MASTURBATION. REEL # 113710 " HYPNO TIRED DUB" VIEWED APPROXIMATELY 60 MINUTES DIPICTS MALES AND FEMALES ENGAGING IN SEXUAL INTERCOURSE, ORAL COPULATION AND MASTERBATION. REEL # 113710 " COUNT ALL COME" VIEWED APPROXIMATELY 60 MINUTES DIPICTS MALES AND FEMALES ENGAGING IN SEXUAL INTERCOURSE, ORAL COPULATION AND MASTERBATION.

THE PREVIOUSLY DESCRIBED FILMS VISUALLY REVEAL ACTS OF NUDITY, AND SEX AND IN YOUR AFFIANT'S OPINION, FAILS TO IMPART ANY SUFFICIENT IDEAS OF SCIENTIFIC OR SOCIAL IMPORTANT AND IS IN YOUR AFFIANT'S OPINION IS IN VIOLATION OF THE OBSCENITY DEFINITION OF THE STATE OF CALIFORNIA, VIOLATION OF SECTION OF 311.2 P.C.

ATTACHED HERETO Page 3 of Attachment No. 1
IS A DETAILED DESCRIPTION OF THE
FILM PREVIOUSLY MENTIONED.

Search Warrant No. 7424

COUNTY OF LOS ANGELES

AFFIDAVIT FOR SEARCH WARRANT

On the basis of his personal knowledge, as set forth in the attachments hereto, and on the basis of the information contained in those attachments,

DENNIS M. FEELEY # 14292 being duly sworn deposes and
(name)
says, that the property described hereinafter falls within those grounds indicated below by "x"(s) in that it:

____ was stolen or embezzled

____ was used as the means of committing a felony

X is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom he may have delivered it for the purpose of concealing it or preventing its discovery

____ is evidence which tends to show that a felony has been committed or a particular person has committed a felony;

and requests the issuance of a warrant to SEARCH HOLLYWOODLAND MOTEL, 10730 VENTURA BLVD. NORTH HOLLYWOOD CALIFORNIA, A TWO STORY STUCCO BUILDING, FACING NORTH, BETWEEN STREETS. FRANKLIN DR AND WILLOW CREST AVE.

SINCE 1952

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NORTH HOLLYWOOD, CA. 91604

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974
No. 74-572

ALBERT JOSEPH ANTICO,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

BURT PINES,
City Attorney

WARD G. McCONNELL,
Chief-Appellate Division

CITY ATTORNEY'S OFFICE
500 Civic Center Law Building
205 South Broadway
Los Angeles, California 90012
(213) 485-5483

Attorneys for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

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500 Civic Center Law Building
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(213) 485-5483

Attorneys for Respondent

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IN THE

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October Term, 1974
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Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondent, People of the State of California, respectfully prays that a writ of certiorari to review the judgment of the Appellate Department of the Superior Court of the State of California, County of Los Angeles,

entered against Petitioner in the above-entitled case on July 26, 1974, not issue.

OPINIONS BELOW

No written opinion was rendered by the Appellate Department of the Superior Court of The State of California for the County of Los Angeles on the judgment entered in the above-entitled action on July 26, 1974.

JURISDICTION

The judgment of the Appellate Department of the Superior Court for the State of California for the County of Los Angeles was entered July 26, 1974. A copy of the judgment appears in Appendix A of Petitioner's writ. A due and timely petition for rehearing or, in the alternative, for certification of the cause to the Court of Appeal was denied by the said Appellate Department on August 12, 1974. A copy of the said order appears in Appendix B of

Petitioner's writ.

By the aforesaid denial of the petition for rehearing or, in the alternative, for transfer to the Court of Appeal, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles became the highest court of the State in which a decision could be had. See, California Penal Code section 1471; California Rules of Court, Rules 24(a) and 28(b); Smith v. California, 361 U.S. 147, 148, fn. 2; Virginia Rye Co. v. Mullins, 271 U.S. 220, 222.

This Honorable Court has clearly established that it should not take jurisidction to review a judgment where no opinion was delivered by the highest court of a state.

The Appellate Department of the Superior Court of Los Angeles County delivered no opinion in this case. Said Appellate Court, therefore, did not directly pass upon any federal questions.

As held by Stembridge v. Georgia, 343 U.S. 541, 547, 96 L.Ed. 1130, 72 S.Ct. 834 (1951):

> "Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a non-federal ground, this court will not take jurisdiction to review the judgment. [Citations]."

Petitioner invokes the jurisdiction of this court under Title 28, U.S.C. section 1257(3). However, the judgment Petitioner seeks to have reviewed by this court became final on August 12, 1974. (California Rules of Court, Rule 107(b)(2); Market Street Railway Co. v. Railroad Com., 324 U.S. 548, 89 L.Ed. 1171, 65 S.Ct. 770)

Rule 22(1) of the Rules of the Supreme Court of the United States required that Peti-

tioner file his petition within ninety days of August 12, 1974. The ninetieth day after August 12, 1974, was Sunday, November 10, 1974. The petition was filed Tuesday, November 12, 1974. Respondent is unaware of any extension of time having been granted Petitioner, and therefore submits the petition was not timely filed.

QUESTIONS PRESENTED

1. Is a conviction for violation of California Penal Code section 311.2, possession of obscene matter with intent to exhibit it to others, violative of the Fourth and Fourteenth Amendments of the United States Constitution, where such possession was admittedly by a motel owner in the form of videotape cassettes to be shown over closed-circuit television from the motel office to motel rooms wherein guests paid additional rent for the privilege of viewing such matter?

2. Is a conviction resulting from admission of evidence seized pursuant to a search warrant violative of the Fourth and Fourteenth Amendments of the United States Constitution where a prior search warrant authorized the search for and seizure of evidence at an unknown location within a motel building, which prior search led to the discovery of Respondent's possession of such evidence within the motel manager's apartment adjacent to the office, on the alleged ground that said prior search warrant did not particularly describe the place to be searched?

3. Is a conviction for violation of California Penal Code section 311.2, possession of obscene matter with intent to exhibit it to others, violative of the Fourth and Fourteenth Amendments of the United States Constitution on the alleged ground that a search warrant authorizing such seizure issued on less than probable cause because the affidavit in support

thereof does not, on its face and independent of another warrant issued immediately prior thereto which did show probable cause, show anything more than private possession allegedly condoned by this court in Stanley v. Georgia, 394 U.S. 557, 22 L.Ed.2d 542, 89 S.Ct. 1243?

4. Was Petitioner's right to due process of law under the Fifth Amendment of the United States Constitution violated by the order granting probation on the alleged grounds that said order was ambiguous, unintelligible, overbroad, unreasonable, and in excess of the scope of the court's authority?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fifth, and Fourteenth Amendments of the United States Constitution and Article I, section 19, of the California Constitution, appear

in Appendix C of Petitioner's petition. The pertinent provisions of California Penal Code section 311.2 are:

> "(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor."

STATEMENT OF FACTS

Petitioner was charged in a misdemeanor complaint filed March 15, 1973, with violation of eight counts of California Penal Code section 311.2. On August 10, 1973, Petitioner was found guilty as to count six, and acquitted as

to five of the other counts. The jury was unable to reach a verdict on two counts, a mistrial was declared as to them and, when Petitioner was sentenced on September 27, 1973, they were dismissed on the trial court's own motion.

In February of 1973, Los Angeles Police Officer D. M. Feeley received information from another officer that the Hollywoodland Motel in the City of Los Angeles was showing hard-core pornography movies in its rooms by means of a videotape system in violation of California Penal Code section 311.2.

On March 2, 1973, Feeley saw an advertisement in the Los Angeles Free Press newspaper which stated:

> "Porno & Privacy now for your enjoyment hardcore films to your room via closed circuit T.V. Full color sound, complete privacy, water beds and mirrors too. The Hollywoodland Motel,

10730 Ventura Blvd. North Hollywood,
North Hollywood, California."

The next day Feeley called the motel and spoke to the manager, who stated:

"the ad states that the films are hardcore and that is just what they are."

At noontime on March 66, 1973, Feeley and a policewoman went to the Hollywoodland Motel and spoke to the manager. Feeley recognized this person to be the person to whom he spoke on the telephone. Feeley told the manager that he had heard the place had some "good" films. The manager stated, "Yes, you're right. This is the place." Feeley then asked the manager, "Do the films have sucking and fucking." The manager stated, "I have some films and they are real hard-core." Feeley asked the manager how this comes about. The manager

stated, "the films are on close circuit TV. All you have to do is turn on the television." Feeley asked the manager, "Do I have to put money into the television?" The manager stated, "No, all you do is pay for the room and turn on channel 6 and I plug you into the movie. It will cost you $17.00 for the both of you. I'll even give you a queen size bed." Feeley gave the manager $17.00 and signed the guest register under the name of Ken Howard. The manager gave Feeley a key to room #2 and stated the room was located around the corner along side the pool area. Feeley and the policewoman went to room #2 and opened the door. The room was in the process of being cleaned as the bed was unmade. Feeley returned to the manager's office and told the manager that room #2 was not available to rent. The manager then gave Feeley a key to room #4. The manager then picked up a telephone on a switchboard and stated to an

unknown person, "Disconnect room #2 and plug them into room #4." Feeley and the policewoman went to room #4, entered the motel room, turned on the television set to channel 6 and a picture appeared on the screen.

The officers then watched a number of pornographic films. During the viewing, the policewoman went to the manager's office to get some change for the cigarette machine. The manager asked her how she liked the films.

Officer Feeley composed an affidavit in support of a search warrant setting forth the above facts as well as a description of the films viewed. A municipal court judge issued a search warrant authorizing the search for and seizure of the films viewed, the TV set on which Feeley viewed them, and the equipment used by the manager to show them. The manager turned out to be the owner of the motel, who is the Petitioner here.

The warrant commanded an immediate daytime search describing the premises as,

"The Hollywoodland Motel located at 10730 Ventura Boulevard, North Hollywood, California. The premises is described as a two story stucco building located on the south side of Ventura Boulevard between Fruitland Drive on the west side and Willowcrest Avenue on the east side. The building is gold in color with pink and green doors on the rooms. The words Hollywoodland Motel in black lettering on a yellow background sign is above the entrance to the motel. A neon sign appears on a pole in front of the building with the words 'heated pool - Hollywoodland - steam baths - water beds.' There is a sign on the east side of the building stating Hollywoodland Motel, pools, kitchens, TV - Phones - Air conditioned. There are

two signs located on the west side of the location stating Hollywoodland Motel. This is the only business at this location."

In conducting the above search Feeley observed three reels of videotape not previously viewed. They were located in the manager's apartment which was located to the west of the main office of the motel. Feeley set forth this observation and a description of the reels' contents in another affidavit and another search warrant was issued, commanding seizure of the three additional reels. The matter contained in count six of the complaint, for which Petitioner was convicted, was seized pursuant to the second search warrant. One of the three films seized pursuant to the second warrant was being played on the equipment in the manager's apartment when Feeley conducted the search commanded by the first warrant; the film which formed the basis for

Petitioner's conviction was viewed by Feeley in order to determine if it was one of the films the seizure of which was commanded by the first warrant.

REASONS FOR DENYING THE WRIT

1. Petitioner was convicted of possession of obscene matter with intent to exhibit to others, a fact he freely admits. He contends that he should somehow vicariously share in the right of his motel room occupants to view obscene matters therein, which right, he contends, extends to such occupants by virtue of this court's opinion in Stanley v. Georgia, 394 U.S. 557 [22 L.Ed.2d 542, 89 S.Ct. 1243].

Respondent feels that Petitioner's contention that Stanley v. Georgia, supra, extends to motel room occupants viewing obscene matter under commercial circumstances such as exist here may be stretching that decision a little, but under California law such would not be

illegal anyway.

Petitioner's contention was clearly dealt with in United States v. Thirty-Seven Photographs, 402 U.S. 363, 326 [28 L.Ed.2d 822, 91 S.Ct. 1400]:

> "Whatever the scope of the right to receive obscenity adumbrated in Stanley, that right, as we said in Reidel, does not extend to one who is seeking, as was Luros here, to distribute obscene materials to the public, . . ."

Respondent submits that no legal authority exists (persuasive in this court, at least) for Petitioner's proposition that the circumstances of his case are so different from the situation where obscene matter is shown in a public theatre. In fact, it seems that showing such matter in a theatre is practically innocuous compared to exhibition at noontime in a motel

room admidst queen size water beds, mirrors and whatever. As previously stated, Petitioner was convicted of possession of obscene matter with intent to exhibit it to others. The fact that the others were admitted into motel rooms instead of theatres changes nothing.

2. Petitioner contends that the first search warrant failed to adequately describe the premises to be searched. This factual question was determined adversely to Petitioner in the trial court; the description was, in fact, quite complete and described a building at a particular address. Beyond that Petitioner seems to argue that the warrant was invalid because it authorized a search of the entire building. Probable cause for a search of the entire building existed because the exact location of the film and equipment within the building was unknown. Nothing was left to the officer's discretion.

Petitioner also seems to be attempting to

argue that the film seized, which was in fact taken from Petitioner's apartment in the motel, should have been excluded because of alleged violation of the rights of possible motel guests. Petitioner has not shown that his argument raises any federal question. (cf. Simmons v. United States, 390 U.S. 377, 19 L. Ed. 2d 1247)

3. Close analysis of Petitioner's contention regarding the second search warrant reveals that he is either arguing that the evidence was insufficient to sustain his conviction or that, considering the second warrant in a vacuum and completely out of context of the first warrant, probable cause for issuance of the warrant was not shown therefor. The first theory ignores the fact that Petitioner made no secret that his possession was not the kind contemplated in Stanley v. Georgia, supra, but was for the purpose of exhibiting it to others. The second theory ignores the

fact that the second warrant referred to and depended upon the first. Petitioner has made no showing that any federal question is presented by his wholly inadequate attempt to equate his situation with mere private possession of obscene matter and none is presented by the fact that he is able to draw different inferences from the evidence than did the trial court.

4. There was no denial of due process of law by the order granting Petitioner probation. The record in this case (Clerk's transcript, page 15) clearly shows that Petitioner accepted and understood the terms and conditions of probation noting only that he had "reservations" about being overly broad. Clearly the order was neither ambiguous nor unintelligible.

The allowable scope of authority of a California court in granting probation would not seem to raise any federal question. Similarly,

Petitioner's contentions regarding over-breath were considered and rejected in the state court. In the absence of some showing that sanctions have been imposed for violation of probation based on the extreme hypotheticals posed, no federal question is stated. (cf. United States v. Raines, 362 U.S. 17, 21-22, 4 L.Ed.2d 524, 80 S.Ct. 519)

CONCLUSION

For the foregoing reasons, Respondent submits that this Honorable Court should deny the writ.

Respectfully submitted,

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